

SERVED: May 17, 1993

NTSB Order No. EA-3882

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 8th day of May, 1993

_____	)	
JOHN W. CRONIN,	)	
	)	
Applicant,	)	
	)	
v.	)	
	)	Docket 92RO-EAJA-
JOSEPH M. DEL BALZO,	)	SE-7749
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

In our Notice of Proposed Rulemaking (NPR) in Equal Access to Justice Act Fees, 57 FR 60785 (December 22, 1992), we granted petitions filed by applicant, among others,<sup>1</sup> to consider applying a cost-of-living inflator to the current \$75 fee cap. We have since adopted the proposed rules. Id., 48 FR 21543 (April 22, 1993).

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<sup>1</sup>See the NPR at note 2 for the names of petitioners.

Applicant has filed a supplemental petition, seeking the incremental increase in hourly fees proposed in the rulemaking as well as other fees not earlier sought, and at the higher level. The Administrator has replied, noting that any additional fees should be consistent with the final rule. The Administrator also is concerned, although he takes no position on the matter, that our NPR does not clearly state whether or not Mr. Cronin is eligible for a supplemental award.

In the rulemaking, we stated that we did not intend to authorize supplemental filings in cases where EAJA fees had already been the subject of a Board order, but that we did intend to permit parties to supplement pending cases to avail themselves of the new standard under consideration. Mr. Cronin's fee application was granted by an administrative law judge on November 2, 1989, and was not appealed to the Board. On the other hand, his associated petition for rulemaking to increase the fee schedule was not dismissed and was subsumed within the recent rulemaking and granted in part. Thus, at the time the notice of rulemaking was issued, a portion of the Cronin petition for fees was closed and a portion was pending. Frankly, we had not foreseen this limited set of circumstances and the availability of the cost-of-living allowance in this docket is not squarely addressed by the notice of rulemaking. Nevertheless, we believe it is appropriate to permit the supplemental filing. As the Cronin petition was part of the basis on which the Board reached a determination to consider the

need for a cost-of-living allowance, and as the Cronin petition was itself still pending at the time of the notice and specifically included within that notice's grant of relief, we think Mr. Cronin should not be denied the benefits of the change in procedures for which he was partially responsible. The FAA does not object to this resolution, and applicant would otherwise be denied the fruits of his effort in filing the rulemaking request.

Applicant's calculations indicate that our new indexing formula produces an additional award of \$1,001.26 above the amounts ordered by the law judge, amounts that apply for the years 1986-1989. We will increase his recovery accordingly.<sup>2</sup>

We will not, however, award other amounts (\$850.53) applicant seeks for 1989-1993. We indicated in the NPR that the authority to file supplemental petitions was intended to allow adjustment of the prior fee award to reflect the new cap. We did not intend the procedure to be used to apply for recovery of fees never before the subject of a Board order or law judge review. Good cause for allowing applicant now to add these entirely new claims (claims unrelated to the issue of the NPR) has not been

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<sup>2</sup>In the NPR, we reminded potential applicants that, just as with the initial award, any subsequent award must also satisfy 49 C.F.R. 826.6(c). The supplemental application here is not a model for compliance with that directive. Nevertheless, because a number of the factors in § 826.6(c) were resolved in granting the prior award and the responses apply equally here, because the indexing still does not exceed the actual hourly charges, and because applicant has stated that counsels' rate is equal to or lower than other Denver aviation attorneys (see § 826.6(c)(2)), we will consider the application complete.

shown, or even alleged.<sup>3</sup>

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Applicant's supplemental petition is granted in part;  
and

2. Applicant is entitled to an additional award of  
attorneys' fees in the amount of \$1,001.26.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and  
HAMMERSCHMIDT, Members of the Board, concurred in the above  
opinion and order.

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<sup>3</sup>Such relief would also be an unwarranted departure from our  
rules at Part 826, Subpart B, especially § 826.24, When an  
application may be filed.